MARSHALING OF MORTGAGED PROPERTY IN FAVOR OF SUBSEQUENT MORTGAGEES.—A holds a first mortgage covering two parcels of land, B holds a second mortgage covering one of these parcels, and C holds a second mortgage covering the other parcel, B's mortgage being prior in time to C's. B's mortgage contains the following clause—"The property described in the within indenture is subject to an existing blanket mortgage held by A, with release clause of $10 per front foot." Upon a bill to foreclose A's mortgage, how should the burden of that mortgage be distributed?

In *Savings Investment & Trust Co.* v. *United Realty & Mortgage Co.*, 94 Atl. 588, the Court of Errors and Appeals of New Jersey held that both parcels should be sold, separately, and the paramount mortgage paid out of the proceeds, each parcel contributing in proportion to its price at the sale. The court "assumes" (as it can hardly avoid doing upon the authorities) that the "rule of sale in inverse order of alienation is applicable in favor of mortgagees, as it is in favor of grantees," but holds that the language of B's mortgage makes the rule inapplicable in this case.

We may agree with the court that the rule "is not one to be applied mechanically to all cases," but "rests upon the real or presumed intent of the parties." We may even admit, *arguendo,* the doctrine of the earlier case of *Jackson* v. *Condict,* 57 N. J. Eq. 522, that, "As between different portions of the premises subject to a common charge, the general and fundamental rule of equity is that the burden is to be borne by the different portions ratably. The exception to the operation of this fundamental rule, which is made for the purpose of marshalling the portions in favor of a prior grantee of a portion of the premises, is based, not on the simple fact of the earliest grant, but upon the conclusion that the character and circumstances of the earliest conveyance are such as to show that it was the intention of the parties to the conveyance that the portion conveyed should be free from the common burden." Yet we must insist that the mere "circumstance of the earliest conveyance," that by that conveyance "one who is bound to pay a mortgage confers upon others rights in a portion of the property, retaining other portions himself" founds an inference, if not a presumption, that he intends to exonerate the grantees, since "it is unjust that they should be deprived of their rights, so long as he has property covered by the mortgage, out of which the debt can be made," (*Cooper* v. *Bigly,* 13 Mich. 473). "And this equity, having arisen in favor of the first purchaser, must remain in his favor against any subsequent equities of other parties derived from his grantor." (Ib.)

We may also concede that, "If the words 'subject to a mortgage' had been found in an absolute deed of conveyance, it would, under our decided cases, have shown an intent to convey only the equity of redemption, and would have prevented the application of the rule of sale in the inverse order of alienation."

From these positions, the court proceeds: "Unless he means by inserting the words 'subject to the mortgage' in the subsequent mortgage to indicate that the parcel therein described is to bear its share of the burden, there is no reason for inserting the reference. With or without the reference, the

mortgagor is liable to the mortgagee for the payment of the debt. With or without the reference, the subsequent mortgagee gets no more security for the mortgagor's obligation than the equity of redemption gives him. His right to have the assets marshaled and the proceeds sold in the inverse order of alienation is clear without the reference. Some other object must have been in view of the parties when the words were inserted. The most natural object was to indicate to subsequent purchasers and mortgagees that the parcel in question was to bear its share of the common burden. * * * Unless, therefore, we are to say that the words are meaningless (a result forbidden by the ordinary rules of construction), we must hold that they were meant to indicate that the liability was to be governed by the general and fundamental rule and be borne by the different portions ratably."

The rule of construction referred to is, of course, the rule that every clause, and every word, even, should be given effect, if possible. (17 AM. & ENG. ENCYC., 2d ed. 7). That this is not an inflexible rule of law would be admitted, surely, by every one. Even in the character of a guide to the intention of the parties, it cannot be taken to mean that each word should be given such "effect" that the instrument as a whole will have a different operation than it would have had without that word. If such were the rule, the use of recitals would be dangerous conveyancing, and there would be no such thing as inserting a clause "out of abundance of caution," for every word used would be used out of an abundance of incaution, at the risk of its being given "effect."

Having in mind this obvious interpretation of the rule of construction referred to, it would seem permissible to say that the clause quoted from B's mortgage was inserted because it stated a fact regarding the condition of the title, just as, in describing the physical property, it might be stated that there was a brick veneer house thereon, in both cases giving information on the face of the conveyance which might be valuable in some unforeseen way, if only to guard against suspicion of an unethical concealment of the facts. But, granting that some "legal effect" must be given this clause, is it not sufficient that such a recital carries actual notice of the existence of the prior mortgage to all who read this second mortgage, and charges with constructive notice, all who claim through it?

Let us, then, subordinate this "rule" of construction to its proper place, and, with due regard to the "circumstances of the conveyance," consider whether "the most natural object" of inserting the clause in question in this mortgage was that found by the court. As between B and his mortgagor what reason might there have been for charging any part of the prior mortgage onto B's parcel, in relief of that retained by the mortgagor? In the case of an absolute conveyance upon a sale of mortgaged land, the vendor may take a cash consideration less than the stipulated value of the land and adjust the transaction by charging the whole or a part of the prior encumbrance upon the purchaser, or upon the land conveyed, or upon both. Such being a not unnatural or unusual transaction, we may be justified in saying that the words "subject to a mortgage," when found in an absolute deed of conveyance, indicate an intention that the land be accepted by the grantee

subject to the burden of the mortgage (in the case of a conveyance of part only of the land mortgaged, that it be accepted subject to a proportionate part of the burden). But, in the case of a conveyance by way of second mortgage, the mortgagor parts with an interest in the land, (creates a lien upon it,) which is *ex vi legis* limited in value by the amount of the cash received by way of loan. The interest acquired by the mortgagee cannot be more, and it ought not to be less, than the amount of his advance. There cannot, then, in the mortgage case, be anything to adjust by way of throwing burdens onto the mortgagee. Hence there can be no reason for inferring that the parties to a second mortgage intend to throw any part of the burden of the prior mortgage upon the s cond mortgagee (except as that may be absolutely necessary to the satisfaction of the prior mortgagee,) unless such intention is very clearly expressed. Upon the contrary, the natural inference in such a case, founded on the plain equity of the situation, is that the parties intended that the mortgagor should, personally and by any of the mortgaged land which he might retain, raise the burden of the prior mortgage in exoneration of the land covered by the second mortgage, so that the second mortgagee might make his debt.

The distinction between sales and mortgages of previously mortgaged land has been recognized in many cases. Thus in *Trusdell* v. *Dowden,* 47 N. J. Eq. 398, it was held that where a junior mortgage contained a clause, "Said premises are conveyed subject to" the prior mortgage, the junior mortgagee was not estopped from showing that the prior mortgage was usurious. The court say: "The doctrine is undoubtedly thoroughly well settled, that the purchaser of the equity of redemption in premises covered by a usurious mortgage, who takes title subject to such mortgage, cannot set up the defense of usury; * * * but the doctrine rests on this foundation: that the purchaser by taking title subject to the mortgage and retaining out of the price he agreed to pay sufficient money to pay the mortgage, places himself in a position where he cannot allege usury without attempting to keep back part of the money which he agreed to pay for the mortgaged land. * * * If the defendant is a mortgagee, and not a purchaser, he has the same right to interpose the defence of usury that any other junior encumbrancer would have. The clause in his mortgage, expressly declaring that the mortgaged premises were, when he took his mortgage, already subject to a prior mortgage, cannot, according to any rule of equity jurisprudence with which I am acquainted, be held to preclude him from showing either that such prior mortgage is usurious or has been paid."

So in *Milligan's Appeal,* 104 Pa. St. 503, where the facts were similar to those of our case, except that it does not appear whether B's mortgage was expressly "subject to" A's mortgage, the court says: "It was contended for the appellants that the case came within the ruling referred to in *Carpenter* v. *Koons* [20 Pa. St. 222, where it was held that a purchaser at sheriff's sale of a portion of mortgaged land takes it equitably charged with a proportionate part of the mortgage debt, because, the statute requiring a sale subject to the prior mortgage, his share of the mortgage formed a part

of the price he agreed to pay for the land] * * * We are unable to see the force of this position. When Shaw took his mortgage on Class 1, he had a clear equity to compel Carothers [the mortgagor] to pay the paramount mortgage out of the remaining portions of the property not embraced in his (Shaw's) mortgage. This is too clear to need elaboration. It was not the case of a purchase subject to the Chalfant mortgage, with a portion of the purchase money withheld to meet it. No such element exists in the case. It is true Shaw's mortgage was in point of fact subject to the paramount mortgage, but he held no funds of Carothers to meet it. On the contrary, he had the clear equity, as before stated, to compel the latter to pay it out of the remaining property. This equity Carothers could not defeat by subsequently conveying or mortgaging Classes 2 and 3. Such grantees had record notice of Shaw's equity."

In *Garnsey* v. *Rogers,* 47 N. Y. 233, it was held that an express assumption of a prior mortgage by a second mortgagee was not enforceable by the prior mortgagee, the court saying, "Where he buys the land absolutely for a stipulated price, and instead of paying the whole of it to his grantor, he is allowed to retain a part, which he agrees to pay to a creditor of the grantor having a lien on the land, the amount which he thus agrees to pay is his own debt, which by arrangement with his grantor he has agreed to pay to the creditor of the latter. * * * But in the case of a party having the land merely as security, such an undertaking is simply a promise to advance money to pay the debt of his grantor or mortgagor, which money when advanced the junior mortgagee can collect under his mortgage." See also *Webber* v. *Lawrence,* 118 Mich. 630, and other cases cited in WILLISTON'S WALD'S POLLOCK ON CONTRACTS, 266.

If we accept the doctrine of *Garnsey* v. *Rogers,* that, had the second mortgagee paid the prior mortgage, it would have been an "advance of money to pay the debt of his mortgagor," it follows, not only that he might collect this money under his own mortgage, but that he could, at his election, have been subrogated to the prior mortgage, as in any case of the payment of a mortgage by one who is compelled to pay it but is not primarily liable thereon. And, if the prior mortgage covered other lands than those embraced in the second mortgage, the second mortgagee might enforce the prior mortgage against such other lands. *A fortiori* in our case, where B did not assume the prior mortgage but merely took "subject to" it, he might, upon paying the senior mortgage, enforce it against the land retained by the mortgagor. But, if this be conceded, it follows that B had a right, upon foreclosure of the senior mortgage, to have the land retained by the mortgagor sold first, for subrogation and marshalling are but alternative remedies for enforcing the substantive equity of exoneration, the latter by way of specific performance, the former by way of reimbursement.

That a mortgage of land expressly "subject to" a prior mortgage is an inherently different transaction from an absolute conveyance expressly "subject to" a prior mortgage, will become more obvious upon consideration of another class of cases. Upon a sale expressly "subject to" a prior mortgage,

not only is the purchaser not entitled to exoneration, but, contrariwise, the vendor is entitled to exoneration, not as against the grantee personally unless there was an express or implied assumption by him, but, in any case, as against the land sold: so that, if the vendor is subsequently compelled to pay the mortgage, he is subrogated thereto, and can enforce it against the land (or, in the case of a sale of a part of the mortgaged land "subject to" the mortgage, he can enforce the mortgage against this parcel for its proportionate share of the debt). *Kinnear* v. *Lowell,* 34 Me. 299; *Travers* v. *Dorr,* 60 Minn. 173; *Greenwell* v. *Heritage,* 71 Mo. 459; *Johnson* v. *Zink,* 51 N. Y. 333; *Murray* v. *Marshall,* 94 N. Y. 611; *Briscoe* v. *Power,* 47 Ill. 447; *Burger* v. *Greif,* 55 Md. 518; *Hall* v. *Morgan,* 79 Mo. 47; *Hoy* v. *Bramhall,* 19 N. J. Eq. 563; *Carpenter* v. *Koons,* 20 Pa. St. 222. But, when mortgaged land is conveyed by way of second mortgage, and the mortgagor subsequently pays the first mortgage, no one would suggest for a moment that he could enforce that mortgage against the land in derogation of the security of the second mortgagee, even though the second mortgage was expressly "subject to" the first (nor even if the second mortgagee expressly "assumes" the first mortgage: *Garnsey* v. *Rogers,* supra) yet that would be but a logical application of the doctrine of the principal case.

The court recognizes that there is a difference between a sale subject to a mortgage, and a mortgage subject to a mortgage, but with a curious result. "Unless an absolute deed is expressly made subject to an outstanding mortgage, the presumption is that it was meant to convey an unincumbered title, and the consideration paid is presumed to be the full value of the land clear of encumbrances. A deed by way of mortgage is different. In the case of such a deed, the fact is that it is only by way of security, and the presumption is rather that the amount secured is less than the value of the property. That being so, there is, in the absence of some special covenant by the mortgagor, no obligation on his part that it can be presumed the parties meant should be made good by the mortgagor out of his remaining land." We may ignore the fact that this is an indirect attack upon the assumption upon which the decision purports to proceed, viz., "that the rule of inverse order of alienation is applicable in favor of mortgagees as it is in favor of grantees," but is the position sound? Is not the court thinking of the comparative value of the money and the physical land, ignoring the fact that a mortgage is not a sale, and that, even in those jurisdictions in which it is held that a mortgage conveys a legal title (the New Jersey court has appeared to be somewhat uncertain as to whether it has that effect or not), it does not vest in the mortgagee the beneficial ownership of the land. The beneficial interest acquired by the mortgagee is a lien, a mortgage interest, an interest which by the law of mortgages is limited by the amount of his loan. In the case of the second mortgage, then "the consideration paid" is "the full value of (the interest acquired in) the land clear of encumbrances," and this not merely by inference or presumption but of legal necessity.

The court says, in the principal case, that it is unusual to have a second mortgage made expressly subject to another mortgage. If this were so, the

case would be of little moment. We believe, however, that it is quite usual and that it is good conveyancing, and that it was never intended to have, and should not be given, the effect which is given to it in this case.

E. N. D.

PAYMENT BY TRANSFER OF CREDIT.—Whether a payment may be effected in the absence of any act of remitting, cancelling note, or making an entry of debit and credit, is a question which recently came, for the first time, before the courts of New York, and was decided in the affirmative by a majority of the Court of Appeals. *Baldwins Bank of Penn Yan* v. *Smith,* (N. Y. 1915), 109 N. E. 138.

The defendant made a promissory note payable at a bank; the plaintiff was a holder for value, who before maturity, sent it to the bank where it was payable, for collection and remittance. On the date of maturity, the defendant, by telephone, instructed the president of the bank at which it was payable to charge the note to his account, and was told that it would be done. As a matter of fact, the bank did not debit the defendant, credit the plaintiff, cancel the note, or make remittance. A week after maturity, the bank suspended; at all times up to the suspension it had been in possession of funds to the maker's credit more than equal to the amount of the note. By the NEGOTIABLE INSTRUMENTS LAW of New York, § 147, a promissory note payable at a bank is made the equivalent of a check and in New York it is not negligence to send a bill for collection to the bank where made payable. It was held: that the plaintiff constituted the bank his agent, *Ward* v. *Smith,* 7 Wall. 447, *Cheney* v. *Libby,* 134 U. S. 68; that the acts in the case amounted to payment as between the maker and the bank where the note was payable; and that the failure of the bank to remit was imputable to the plaintiff.

Owing to the unusual situation, there are but few cases bearing upon the question, but the facts in *Moore* v. *Meyer,* 57 Ala. 20, are practically identical, and in that case a contrary decision was reached. This fact, combined with a dissenting opinion in the instant case by two of the justices, raises the stronger doubt as to the correctness of the decision. While much of the majority's reasoning was vigorously and perhaps effectively assailed, it is submitted that its conclusion can be supported along the following lines: It has been decided (provided always that there are sufficient funds to drawer's credit and at bank's disposal): (1) that if entries are made on the books of the bank, payment is complete. *Mayer* v. *Heidelbach,* 123 N. Y. 332; *Pratt* v. *Foote,* 9 N. Y. 463; *Bartley* v. *State,* 53 Neb. 310; *Wildinson* v. *Bradley,* 54 Ala. 677; (2) that if an entry of credit is made on a deposit slip, payment has been made, *Oddie* v. *First National City Bank,* 45 N. Y. 735; (3) that if a note is marked "paid," though not entered in any respect, payment has resulted. *Nineteenth Ward Bank* v. *First National Bank of South Weymouth,* 184 Mass. 49. It would seem to be but one further step to hold that under certain circumstances there may be a payment without the usual acts that denote it. If the parties have entered into a transaction wherein all the elements warranting payment are present, and their conduct evinces that it was their intention to consider the note—which in New York is equiva-